No. 18136

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AL TATTI, INCORPORATED, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order issued against respondent on March 9, 1962. The Board's decision and order (R.

[1] The pertinent statutory provisions are reprinted as Appendix A *infra*, pp. 20-22.

14-A-28)[2] are reported at 136 NLRB No. 17. This Court has jurisdiction, the unfair labor practices having occurred in Downey, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(a)(1) of the Act by threatening its employees and interrogating them regarding their union activities. The Board further found that respondent violated Section 8(a)(3) and (1) by discharging employees George Filbig and Werner Berg because of their union activity. Finally, the Board found that respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.[4] The facts underlying the Board's findings are summarized below.

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[2] References to the pleadings, the decision and order of the Board, and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C. Ex." refers to exhibits of the General Counsel. Wherever in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Respondent sells and services Volkswagen automobiles. It makes substantial sales and shipments in interstate commerce and no jurisdictional issue is involved. (R. 4-5, 10, 14-A.)

[4] International Association of Machinists, AFL-CIO.

A. *A majority of respondent's service department employees join the Union and the Union requests recognition and contract negotiations*

During the events involved here, respondent's service department consisted of a maximum of 11 employees who, for the most part, are mechanics with special technical experience and training for work on Volkswagen automobiles. It is not disputed that the department is an appropriate unit for collective bargaining and that, as set forth below, a majority of the employees designated the Union as their bargaining agent. (R. 17-18 n. 3, 25; Tr. 10-11, 238, 331-332.)

In the early spring of 1961, mechanics Werner Berg and George Filbig spoke to other employees about joining a union.[5] In April, Berg and Filbig met with Charles Edwards, a Union representative. They told Edwards they wanted to become organized because of "working conditions" maintained by respondent. Edwards gave them Union authorization cards and literature. (R. 15, 25; Tr. 91-94, 110, 151-152, 191-192.) A month or so later, the Union held a meeting of the employees and seven of them signed cards (R. 15, 25; Tr. 42-47, 95-96, 131, 135-136, 152-156, 192, GC Ex. 5-A to 5-G).

On June 19, the Union sent respondent a letter stating that it represented a majority of the service

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[5] Shortly before, in January, Berg had asked Louis Meeks, then respondent's service manager and admittedly a supervisor under the Act, why respondent paid its mechanics on a commission basis. Meeks replied that it was "to keep up the wage standards, and to keep the union out." (R. 2, n. 1; Tr. 13-14, 157, 160.)

department employees, and requesting recognition and a bargaining meeting (R. 15, 25-26; 7, 15-16, 303, G.C. Ex. 2). Al Tatti, respondent's president and principal owner, was then traveling abroad. Office Manager Clarence McCall, whom Tatti had left in charge of the business, gave the letter to a labor-relations consultant. However, a reply was never sent, and respondent did not contact the Union, even after Tatti returned a few weeks later. (R. 15, 19 n. 4, 25-26; Tr. 16, 19-20, 126, 128, 185-186, 239-240, 267, 269-272, 280, 303, 304-305, 310.) Two days after the Union sent the letter, it filed a representation petition seeking a Board election (R. 15, 2; Tr. 8-9, 16, 303).

B. *Respondent threatens and interrogates the employees concerning the Union and discharges Berg and Filbig*

About a week later, on June 30, Sales Manager Albert Lauer, admittedly a supervisor under the Act, asked Berg "why [the employees] were joining the union," and told Berg that the Union would not do them any good (R. 16, 26; Tr. 14, 160-162). About two weeks later, Berg walked by Lauer and employee Eddie Taylor at about 4:30 in the afternoon, 30 minutes before quitting time. Lauer motioned to Berg, and told him, "Mr. Tatti was going to get real tough on anybody that was drinking beer," so he "should watch" himself.[6] Berg replied that he was

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[6] Taylor, who appeared as respondent's witness at the hearing, testified that Lauer stated to him and Berg, "No drinking tonight, boys" (R. 18; Tr. 293).

not worried because he never drank "during working hours." (R. 18; Tr. 163.) (As set forth *infra*, pp. 12-15, for at least 2 years the employees in the shop have often drunk a beer on the premises after quitting time at 5 p.m.). About 5:30 p.m., Taylor asked Berg, Filbig, and employee Max Spitznagel, who were cleaning up to go home, if they wanted a can of beer. They all did, and Taylor went to a nearby liquor store and brought back four cans. (R. 18; Tr. 68, 69, 82, 83, 89, 97, 164, 165, 290, 294.) Taylor drank a small part of his, then hurriedly left (R. 18; Tr. 98, 116, 118, 166, 199-200). Right after Taylor left, Tatti and Sales Manager Lauer appeared in the shop.[7] Tatti walked over to Berg, who already had the upper part of his work clothes off, grabbed the beer from his hands, and told him he was first fired for drinking on the job. When Berg stated that it was "past working time," and he "wasn't drinking on the job," Tatti replied that he was fired for "drinking on the premises." (R. 18; Tr. 69, 84-85, 98, 119, 168, 338, 342.) Tatti then asked Filbig if he had drunk any beer. Filbig admitted that he had, and Tatti fired him also. (R. 18; Tr. 68-69, 100, 337.) Berg then observed that Spitznagel had also drunk a beer. Tatti stated he "didn't see" him do it, and walked out of the shop (R. 18, 27 n. 2; Tr. 100, 170). Respondent has work rules posted governing

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[7] Tatti testified that he came back in the shop just then to help Lauer check a car serial number against an entry in the service book record (R. 17; Tr. 83, 98, 229, 283, 327, 342).

employee conduct, but has no rule posted dealing with drinking (R. 18, 27 n. 2; Tr. 261-262).

Three days later, on July 21, the Union, having learned of the employees' discharges, withdrew its election petition and filed the instant unfair labor practice charges (R. 15, 27; Tr. 9-10, 21).

Berg and Filbig were discharged on July 18, a Tuesday. On the following Saturday, Sales Manager Lauer called them to say that respondent wanted them back, and asked them to report to Tatti on Monday morning. (R. 15, n. 1, 27; Tr. 101, 103, 171.) When they reported on Monday, Tatti told them they could return to work if they signed a statement that they were fired for drinking on the job and did not expect backpay. Both men indicated that they wanted to come back, but neither would agree to sign such a statement and both said they wanted to talk to the Union about the matter. (R. 15-16, 26; Tr. 104-106, 173.) Later that day Tatti sent them a telegram reading, "New developments see me today about job" (R. 16, Tr. 106, 174, 238, G.C. Ex. 6). Berg and Filbig went to see Tatti late that afternoon. He told them they could go back to work with "no stipulation this time" (R. 16, 26; Tr. 106-107, 176). They returned to work the next morning, July 25 (R. 16; Tr. 100, 176). The next day, July 26, as employee Leroy Vander Stroom and Tatti were driving to another automobile agency, Tatti asked him who got the Union "started in the shop." And, as they pulled up to the agency, Tatti, referring to the other agency, commented that "these boys finally realized that this

union didn't work out for them." (R. 16; Tr. 24-25, 28-29, 33-36, 249-250.)

A few days later, on July 31, mechanic Milton Tubbs returned from vacation. He remarked to Louis Meeks, then respondent's service manager (see *supra*, p. 3, n. 5), that he had "heard that [Berg and Filbig] got fired or something." Meeks said it was true, "they were organizing—trying to organize a union." (R. 16, 26; Tr. 14, 131-133.) Two weeks later, on August 16, Tatti told employee Willem Vander Stroom that "the mechanics could be replaced if the Union came in" (R. 16; Tr. 137). On another occasion Tatti asked Vander Stroom "how many people the Union had." Vander Stroom avoided answering, and Tatti, counting on his fingers, surmised that "it came out about even," and that "as long as we can keep it that way they can't win." (R. 16; Tr. 139.) A few weeks later, in late September, Vander Stroom asked Perk Ogden, the new service manager and admittedly a supervisor, if "Tatti had accepted the fact that the union was going to come in." Ogden replied that the Union would "never get in" because "we could replace the mechanics." Ogden indicated he "knew where [respondent] could get them." (R. 16; Tr. 14, 141, 286.)[8]

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[8] Page 141 of the transcript of testimony was inadvertently omitted from the photostatic copy of the transcript and is set forth *infra*, p. 24, as Appendix C.

II. The Board's conclusions and order

The Board agreed with the Trial Examiner that respondent violated Section 8(a)(1),(3) and (5) of the Act. Thus, the Board found that the inquiries and statements by respondent's officials constituted, under the circumstances, coercive interrogation and threats of reprisals, in violation of Section 8(a)(1) (R. 26). The Board further found that respondent discharged employees Werner Berg and George Filbig because of their union activity and active participation in the Union's campaign, in violation of Section 8(a)(3) and (1), rejecting as pretextuous respondent's contention that the employees were discharged for drinking beer on the premises. (R. 27). Finally, the Board held that respondent violated Section 8(a)(5) and (1) by failing to answer the Union's request for recognition and bargaining, and immediately setting out to undermine the Union's majority through unfair labor practices (R. 27).

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner impinging on employee rights guaranteed under the Act. Affirmatively, the order requires respondent to bargain with the Union upon request; to compensate employees Berg and Filbig for loss of wages; and to post appropriate notices. (R. 20-23, 28.)

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT IN RESPONSE TO THE UNION'S DEMAND FOR RECOGNITION RESPONDENT COMMITTED UNFAIR LABOR PRACTICES IN AN EFFORT TO DISSIPATE THE UNION'S MAJORITY STATUS

A. The Board properly found that respondent violated Section 8(a)(3) and (1) by discharging Berg and Filbig because of their union activity, and interrogated and threatened employees regarding union activity in violation of Section 8(a)(1)

1. *Substantial evidence supports these findings*

As shown in the Statement, in January 1961, mechanic Werner Berg, apparently dissatisfied with working conditions, asked Service Manager Louis Meeks why respondent paid its mechanics on a commission basis. Meeks replied it was to "keep the union out." Subsequently, Berg and fellow mechanic George Filbig took the initiative in contacting the Union, and successfully recruited a majority of the employees. However, when the Union requested recognition as their bargaining agent, respondent ignored the request. Instead, it set out to determine, by asking Berg, "why [the employees] were joining the union" (*supra*, p. 4). Then, having ignored the Union's request for a month, respondent abruptly discharged Berg and Filbig. Respondent clearly knew, as the Board found (R. 27), that these two employees "were the instigators of the Union's campaign." Thus, as indicated above, Sales Manager Lauer sought out Berg before the discharges to discover why the employees were turn-

ing to the Union. A week after the discharges and after the Union had filed unfair labor practice charges, respondent, while eventually reinstating the two men, first solicited their signed statements that union activity had not motivated their discharges. Such action strongly suggests that respondent knew it had deprived them of employment for proscribed reasons and was attempting to avoid their seeking relief in the remedial provisions of the Act. Cf. *N.L.R.B.* v. *Homedale Tractor & Equip. Co.*, 211 F. 2d 309, 314 (C.A. 9), cert. den., 348 U.S. 833; *N.L.R.B.* v. *Brady Aviation Corporation*, 224 F. 2d 23, 25 (C.A. 5). In any event, the record establishes that union activity motivated the discharges. Just a few days after the men were reinstated, Service Manager Meeks indicated (*supra*, p. 7) that they had been discharged for "trying to organize a union." This statement by a highly placed company official, "who is in a position to know the reason for the discharge," eliminates all doubt as to motive. *N.L.R.B.* v. *Sun Co. of San Bernadino*, 215 F. 2d 379, 381 (C.A. 9).[9]

Moreover, following the discharges respondent interrogated and threatened employees in a manner clearly violative of Section 8(a)(1) and revealed, as to the discharges, "what its attitude undoubtedly was immediately preceding that event" (*Angwell*

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[9] Accord, *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *N.L.R.B.* v. *Ferguson*, 257 F. 2d 88, 90 (C.A. 5); *N.L.R.B.* v. *Southern Desk Co.*, 246 F. 2d 53, 54 (C.A. 4).

Curtain Company, Inc. v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7)). Cf. *N.L.R.B.* v. *Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 313, 314-316 (C.A. 9), cert. den., 348 U.S. 833. As shown in the Statement, through various supervisory officials, respondent questioned employees about the Union, coupling the inquiries with intimations that the advent of the Union would affect job security. To a large extent, the employees were approached *after* Berg and Filbig had been abruptly discharged for union activity. As respondent had dramatically demonstrated its antiunion hostility by firing the two men most active in bringing the Union in, it was well aware that its inquiries about the Union could easily have an intimidating effect on the employees. Moreover, President Tatti, as well as Service Manager Perk Ogden, accompanied union inquiries with remarks that the Union would "never get in" because respondent "could replace the mechanics." That such conducted tainted the interrogations with coercion and constituted threats of reprisals, in violation of Section 8(a)(1), is too well settled to require discussion.[10] In sum, while the Board's finding of discriminatory motive is amply supported by direct evidence, that finding is underscored by the union hostility established by respondent's interference with its employees' Section 7 rights

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[10] *N.L.R.B.* v. *Sebastopol Apple Growers Union*, 269 F. 2d 705, 707-708 (C.A. 9); *Carpinteria Lemon Assn.* v. *N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), certiorari denied, 354 U.S. 909; *N.L.R.B.* v. *Monroe Feed Store*, 237 F. 2d 116 (C.A. 9), enforcing 110 NLRB 630; *N.L.R.B.* v. *Sun Co. of San Bernardino*, 215 F. 2d 379, 381 (C.A. 9).

and by its unlawful refusal to accept their chosen union as their bargaining representative (see discussion *infra*, pp. 15-18).

The testimony of respondent's officials that several of the unlawful statements were not made as testified to by the General Counsel's witnesses, raises merely a question of credibility. The Trial Examiner, noting "several instances of implausibility or conflict" in testimony by respondent's representatives, largely credited the General Counsel's witnesses (R. 16, n. 2). The Board affirmed his findings. "For obvious reasons, questions of credibility were for the Examiner." *N.L.R.B.* v. *State Center Warehouse*, 193 F. 2d 156, 157 (C.A. 9). See also *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 407-408; *N.L.R.B.* v. *Int'l Longshoremen's Warehousemen's Union, Local 10, et al.*, 283 F. 2d 558, 562-563 (C.A. 9); *N.L.R.B.* v. *Anderson*, 206 F. 2d 409 (C.A. 9), cert. den., 346 U.S. 938.

2. *The Board properly rejected respondent's explanation for the discharges*

The Board's finding of discriminatory motive is "strengthened by the fact that the explanation for the discharge[s] offered by respondent fails to stand under scrutiny." *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9). Thus, respondent contended that Berg and Filbig, concededly valuable, "technically well experienced," and "school[ed]" mechanics (R. 18; Tr. 238), were discharged for drink-

ing beer on the premises after working hours.[11] However, the record is replete with evidence that the employees in the service department regularly have a "can of beer" after quitting work and while "cleaning up" to go home. The several employees called to testify uniformly stated that for at least the last two years, "a beer" after quitting time, in the presence of various supervisory personnel, was "almost" a "weekly" occurrence, and, indeed, had taken place just a week before the discharges. (R. 17, 27 n. 2; Tr. 58-67, 73-82, 88-89, 107-109, 127-128, 176-180, 182, 194.) Consistent with this testimony, respondent had posted work rules aimed at employee conduct on the premises, but none of these rules dealt with drinking beer (R. 18; Tr. 70-71, 261-262). Indeed, as the Trial Examiner observed (R. 17), "the record is barren that drinking beer after working hours had ever been considered an infraction of a rule * * *."[12] Significantly, in June 1961, a month before the discharges, Sales Manager Lauer in return for a favor performed by one of the employees, gave this employee $1.50

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[11] Respondent's contention that the men were still working does not merit extended discussion, as respondent conceded that the events occurred after quitting time, 5 p.m. Moreover, its contention that Filbig and Berg were discharged for cause rests solely on the *discredited* testimony of Tatti and Sales Manager Lauer.

[12] Tatti's testimony that he personally interviewed applicants and told them drinking was not allowed on the premises was flatly contradicted by the employee witnesses, and was discredited (R. 17; Tr. 72, 86, 124, 203-204, 228, 263-264, 336, 341, 346-347, 354-355).

to buy a 6-pack carton of beer for employees who had stayed at work late the previous day to put seats in a car. The beer was drunk on the premises after working hours. (R. 17; Tr. 66, 87-88, 180-181, 208-209, 312, 318).[13]

Plainly, if respondent had a rule against drinking on its premises after the shop was closed, "no such policy had ever been revealed to anyone before."[14] *American Steel Foundries* v. *N.L.R.B.*, 158 F. 2d 896, 899 (C.A. 7). Cf. *N.L.R.B.* v. *State Center Warehouse, etc.*, 193 F. 2d 156, 158 (C.A. 9). Respondent's sudden assertion of such a policy on the advent of a union campaign which, as we have shown, it opposed and sought to defeat by unlawful means, warrants the Board's finding that it is but a "patent pretext for [the] discharges" (R. 27). Cf. *State Center Warehouse, etc., supra.*[15] Furthermore, Tatti's refusal to take *any* disciplinary action against mechanic Max Spitznagel, who he knew had been drinking beer with Berg and Filbig, supports this finding. As far as the record reveals, the only dis-

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[13] Lauer's testimony that he gave the $1.50 as a "tip" was discredited (R. 17).

[14] Filbig did testify that about 3 years before Tatti told him he did not "allow drinking at working hours * * * because it would make a bad face to the customers" (R. 17; Tr. 336). Obviously, this is not inconsistent with a willingness to allow the drinking of beer by the mechanics *after* working hours.

[15] See, in addition, *Magnolia Petroleum Co.* v. *N.L.R.B.*, 200 F. 2d 148, 149 (C.A. 5); *N.L.R.B.* v. *Dan River Mills*, 274 F. 2d 381, 384 (C.A. 5).

tinguishing factor between the discriminatees and Spitznagel is their active part in the Union's campaign.[16] See, e.g., *N.L.R.B.* v. *Osbrink*, 218 F. 2d 341, 343 (C.A. 9), cert. den., 349 U.S. 928; *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 801 (C.A. 5); *N.L.R.B.* v. *Kohler Co.*, 220 F. 2d 3, 9 (C.A. 7).

B. The Board properly found that respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1)

As indicated, *supra*, p. 3, it is not disputed that the Union represented a majority of the employees in a proper unit at the time that it requested recognition and a bargaining meeting. Furthermore, respondent at no time challenged the Union's majority. Its sole defense before the Board for its refusal to recognize the employees' chosen bargaining representative was that the filing of the election petition relieved it of its duty to recognize the Union until its majority was established in a Board election.

Respondent's defense in this regard is wholly without merit. It is settled law that the Union's filing of the representation petition did not relieve respondent of its bargaining obligation. *N.L.R.B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209, n. 1 (C.A. 9); *N.L.R.B.* v. *Poultry Enterprises, Inc.*, 207 F. 2d 522, 524-525 (C.A. 5). In *N.L.R.B.* v. *Trimfit of Cali-*

[16] It is equally significant that as far as the record reveals, Spitznagel, concededly in the bargaining unit, did not join the Union (R. 18, 25; Tr. 11, 331-332, G.C. Ex. 5-A to 5-G). And, as shown *supra*, p. 7, Tatti revealed he had some knowledge of who had joined by "counting them on his fingers" before employee Willem Vander Stroom.

fornia, Inc., supra at 209, this Court stated the familiar and well-established rule here applicable:

> Respondent contends that it had no duty to bargain until the union had established its majority status by a Board election. There is no absolute right vested in an employer to demand an election. * * * If an employer in good faith doubts the union's majority, he may, without violating the Act, refuse to recognize the union until the claim is established by a Board election. A doubt professed by an employer as to the union's majority claim must be genuine. Otherwise the employer has a duty to bargain and may not insist upon an election.

Accord, *N.L.R.B.* v. *Idaho Egg Producers*, 229 F. 2d 821 (C.A. 9); *N.L.R.B.* v. *W. T. Grant Co.*, 199 F. 2d 711, 712 (C.A. 9), cert. den., 344 U.S. 928; *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9), cert. den., 348 U.S. 829; *N.L.R.B.* v. *Geigy*, 211 F. 2d 553, 556 (C.A. 9), cert. den., 348 U.S. 821; *N.L.R.B.* v. *Scott & Scott*, 245 F. 2d 926. 928 (C.A. 9); *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. den., 341 U.S. 914.

Manifestly, this rule applies with even greater force where, as here, respondent does not even profess "doubts" of any kind as to the Union's majority. We submit, in short, that the instant case is a classic example of an employer whose refusal to honor a Union's claim for recognition based on a card majority was solely for the purpose of gaining time "to

dissipate the union's majority * * *." [17] *Trimfit of California, supra,* 211 F. 2d at 210. See also, cases cited, *supra,* p. 16. Thus respondent ignored the Union's demand and embarked on a program of interrogations, threats, and discriminatory discharges of the two most active union adherents.[18] The design of these actions is patently reflected in Tatti's statement to an employee that as long as he could keep the number of the people in the Union about "even," it could not "win" (*supra,* p. 7). However, respondent, not having a good faith doubt of the Union's majority, had a duty to recognize and bargain with it. It cannot, as Tatti sought, use the "election provisions [of the Act] as a procedural device * * * [to] secure time necessary to defeat efforts toward organization being made by a union * * *." *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. den., 341 U.S. 914.

Finally, respondent's contention that the Union's *withdrawal* of the election petition is inconsistent with a claim of majority is similarly without merit. Respondent's conduct, particularly the discriminatory

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[17] It is, of course, well settled that "a union may be effectively designated as the bargaining representative by the signing of authorization cards [citing cases]." *N.L.R.B.* v. *Geigy Company, Inc.,* 211 F. 2d 553, 556 (C.A. 9), cert. den., 348 U.S. 821. And, as in the instant case, "There was no necessity for the union to offer proof of the genuineness of its majority claim absent a challenge by respondent." *Trimfit of California, supra,* 211 F. 2d at 210.

[18] Significantly, we submit, the discharge of two employees was just sufficient to destroy the Union's 7 out of 11 majority.

discharges, had destroyed the possibility of free choice by the employees. The Union's only recourse was to forego the election, establish its demonstrated majority in an unfair labor practice proceeding, and secure a bargaining order.[19] Accordingly, its "withdrawal of the representation petition in no way prejudiced [its] demand for recognition." (*Trimfit of California, supra,* 211 F. 2d at 209 n. 1). See also, *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 264 (C.A. 9), cert. den., 348 U.S. 829. In sum, respondent "is hardly in a position to complain about the union's [withdrawal of its election petition] when respondent's own unfair labor practices rendered a free election impossible" (*Trimfit of California, supra,* 211 F. 2d at 210). Accord, *N.L.R.B.* v. *Whitelight Products Division,* 298 F. 2d 12, 14 (C.A. 1), cert. den., 369 U.S. 887, and cases there cited.

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[19] The Union's action was consistent with the Board's "settled policy not to conduct representation elections during the pendency of unfair labor practice charges." *Trimfit of California, supra,* 211 F. 2d at 206 n. 2. See also, *N.L.R.B.* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307-308 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully requested that a decree issue enforcing the Board's order in full.[20]

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National Labor Relations Board.

December 1962.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
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[20] Respondent's asserted compliance with the Board's order in no way renders enforcement proceedings moot, as the Board is entitled to a decree to insure against the resumption of unfair labor practices. *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568; *N.L.R.B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 208 (C.A. 9).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *

Prevention of Unfair Labor Practices

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satis-

faction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Rec'd in Evidence
1(c)	4	3	4
1(f)	4	3	4
2	7	7	8
5A-5G	45	45	46
6	174	175	175

APPENDIX C

The following page of the stenographic transcript of Willem C. Vander Stroom's testimony was inadvertently omitted from the photostatic copy of the transcript and is reprinted herein:

[Tr. 141] Q. Where did it take place exactly?

A. In the service manager's office, or in the write-up office.

Q. What was said by whom?

A. Well, I asked Mr. Ogden if Mr. Tatti had accepted the fact that the union was going to come in, and he said, "No, they will never get in." I said, "How could he prevent it?" "Well," he says, "we could replace the mechanics." I asked him if he could—it just didn't seem feasible, so I asked him how he could do about getting capable replacements, you know, just to replace all six mechanics at one time, and he says he knew where they could get them.

Q. Is that all you recall about the conversation?

A. Yes.

MR. EVANS: No more questions.

CROSS EXAMINATION

Q. [By Mr. Fredricks] You say that Mr. Ogden said that the mechanics could be replaced?

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. Have any mechanics been replaced in fact?

A. No.

Q. You said you had this conversation on the 23rd of September, 1961, in the p.m.?

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